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No. 04-1415

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
WILLIAM GARIBALDI and CARLOS SAMUEL,

Petitioners,

v.

ORLEANS PARISH SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In absence of "extraordinary circumstances", does a change in decisional law after the finality of a judgment warrant reopening the judgment under Rule 60(b)(6)?

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REASONS FOR DENYING THE PETITION

I. The Fifth Circuit did *not* essentially rule that Rule 60(b)(6) relief can never rest on a change in decisional law, and therefore, the Fifth Circuit's decision is *not* in conflict with the decisions of other Courts of Appeals.

The Court of Appeals for the Fifth Circuit correctly reversed the District Court's decision which granted Petitioners' Rule 60(b)(6) Motion. In reversing the district court, the Fifth Circuit applied the following rule of law:

> In the absence of "extraordinary circumstances," a change in controlling decisional law after the finality of a judgment does not warrant reopening the judgment under Rule 60(b)(6).

See App. 2a of the Petition for Writ of Certiorari ("Petition").

The above rule of law is correct and was also correctly applied by the Fifth Circuit to the facts of *Garibaldi II*[1].

Petitioners' Writ of Certiorari stated the Question Presented as:

> Whether a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law – regardless of the facts and circumstances that accompany such a change.

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[1] *United States ex rel. Garibaldi v. Orleans Parish School Board,* 397 F.3d 334 (5th Cir. 2005) (hereinafter referred to as *"Garibaldi II".*)

See page i of Petition. However, the Fifth Circuit did not make such a pronouncement. To the contrary, the Fifth Circuit stated that:

> We must decide whether the Supreme Court's decision in *Chandler*[2] combined with the facts of this case gave rise to "extraordinary circumstances" warranting the district court's exercise of its discretion under Rule 60(b)(6) to grant relief from our final judgment in *Garibaldi I*.[3]

See App. 4a of the Petition.

Petitioners' assertion – that the Fifth Circuit essentially ruled that Rule 60(b)(6) relief can never rest on a change in decisional law – is simply not correct. The Fifth Circuit held that Rule 60(b)(6) relief can rest on a change in decisional law, but only if the facts of the case give rise to "extraordinary circumstances." The Fifth Circuit carefully analyzed the facts of *Garibaldi II* and found that extraordinary circumstances were not present.

In determining that *Garibaldi II* did not present extraordinary circumstances, the Fifth Circuit stated that:

> The circumstances here are not "extraordinary" because this case is not materially distinguishable from the "ordinary" case in which a subsequent

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[2] *Cook County v. United States, ex rel. Chandler*, 538 U.S.119, 123. S. Ct. 1239, 155 L. Ed. 2d 247 (2003).

[3] *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir. 2001) (hereinafter referred to as "*Garibaldi I*".)

> change in controlling law is not held to justify relief from a prior final judgment under Rule 60(b)(6).

See App. 2a of the Petition.

As noted by the Fifth Circuit:

> The discretion of the district court is not unbounded, and must be exercised in light of the balance that is struck by Rule 60(b)(6) between the desideratum of finality and the demands of justice.

See App. 9a of the Petition.

Accordingly, the Fifth Circuit concluded that:

> The circumstances of this case do not justify the district court's use of its discretion to grant relief under Rule 60(b)(6).

See App. 10a of the Petition.

Undoubtedly, the discretion to grant a Rule 60(b)(6) Motion, first requires that "extraordinary circumstances" be present. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847,864 (1988). The party seeking the relief must persuade the court that the circumstances are sufficiently "extraordinary" to warrant relief. Only after proving that "extraordinary circumstances" exist, can the decision to grant the relief become a matter of the trial court's sound discretion. *Booker v. Singletary*, 90 F.3d 440, 35 Fed.R.Serv.3d 983 (11th Cir. 1996).

In *Garibaldi II,* the Fifth Circuit found that there were no extraordinary circumstances present, and therefore, there was no need to consider whether the district court abused its discretion. In other words, since there were no extraordinary circumstances present, the district court obviously abused its discretion.

Before a district court can invoke its discretion to grant or deny Rule 60(b)(6) relief, there must first be extraordinary circumstances present. *Stradley v. Cortez* 518 F.2d 488, 495 (3d Cir. 1975) (exceptional circumstances are a prerequisite for relief under Rule 60(b)(6)). "Despite the 'broad' discretion that courts enjoy to grant relief under Rule 60(b)(6), such relief is warranted 'only in exceptional or extraordinary circumstances.'" *Johnson v. Unknown Dellatifa,* 357 F.3d 539, 543 (6th Cir. 2004).

> Absent extraordinary circumstances . . . , it is certainly a proper use of a district court's discretion to invoke the strong policy favoring the finality of judgments.

Cincinnati Ins. Co. v. Flanders Elec. Motor Service, Inc. 131 F.3d 625, 630 (7th Cir. 1997). Stated another way, absent extraordinary circumstances, it is *not* proper use of a district court's discretion grant Rule 60(b)(6) relief.

Accordingly, the Fifth Circuit did *not* rule that Rule 60(b)(6) relief can never rest on a change in decisional law.

Furthermore, in order to assert sufficient grounds for this Court to consider the Writ of Certiorari, the Petitioners' need to show that *Garibaldi II* is in conflict with decisions of other

Courts of Appeal. By misstating the actual holding of the Fifth Circuit' decision in *Garibaldi II*, the Petitioners have manufactured an alleged conflict between *Garibaldi II* and the decisions of other Courts of Appeals, namely *Ritter v. Smith*[4] and *Pierce v. Cook & Co.*[5]

In the case at bar, the Fifth Circuit did not hold that a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law. Consistent with the rule of law stated in *Liljeberg*, *Ritter* and *Pierce*, the Fifth Circuit held that a district court does have discretion to grant Rule 60(b)(6) relief based upon a change in decisional law, but only if "extraordinary circumstances" are present.

The cases of *Ritter v. Smith* and *Pierce v. Cook & Co.* are discussed below and are clearly distinguishable from *Garibaldi II*.

A. The Fifth Circuit's decision in *Garibaldi II* is consistent with the Eleventh Circuit's Decision in *Ritter v. Smith.*

Garibaldi II is not in conflict with *Ritter v. Smith.* The Eleventh Circuit case of *Ritter,* 811 F.2d 1398 (11th Cir.), *cert. denied,* 483 U.S. 1010 (1987) concerned the constitutionality of Alabama's death penalty statute. After receiving a sentence of death, Ritter, brought a constitutional challenge to Alabama's death penalty statute. In its first

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[4] *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), *cert. denied*, 483 U.S. 1010, 107 S. Ct. 3242, 97 L. Ed. 2d 747 (1987).

[5] *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 723 (10th Cir. 1975).

review of the case, the United States Court of Appeals for the Eleventh Circuit ruled that the statutory scheme as it appeared at that time was facially unconstitutional, and ordered that Alabama re-sentence the defendant within 180 days. *Ritter v. Smith,* 726 F.2d 1505, 1515-1517, *cert. denied*, 469 U.S. 869, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984). Just one week later, the United States Supreme Court granted *certiorari*[6] to consider the same issue in a different case[7], wherein the Supreme Court of Alabama disagreed with the Eleventh Circuit and ruled that the death penalty statute was constitutional.

Certiorari was granted by U.S. Supreme Court. It is extremely significant that this Court noted the conflict between *Ritter v. Smith* and *Ex Parte Baldwin*, and then expressly stated that it had "granted certiorari to resolve this significant conflict." *Baldwin v. Alabama*, at 374.

Given this, the State of Alabama requested that the time for re-sentencing the defendant in *Ritter* be extended until the U.S. Supreme Court ruled in the *Baldwin* matter. The request for the sentencing delay was granted.

In *Baldwin v. Alabama*, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985), the United States Supreme Court found that the Alabama statute was constitutional.

Shortly thereafter, and before the period for Ritter's re-sentencing had expired, the State of Alabama filed its 60(b)(6)

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[6] *Baldwin v. Alabama*, 469 U.S. 1085, 105 S. Ct. 589, 83 L. Ed. 2d 699 (1984).

[7] *Ex parte Baldwin,* 456 So.2d 129 (1984).

motion in *Ritter* seeking to re-instate its death penalty verdict in light of the Supreme Court's ruling in *Baldwin*. When considering the Rule 60(b)(6) motion, the Eleventh Circuit faced a set of circumstances even it regarded as "rare." *Ritter v. Smith*, 811 F.2d at 1399. Thus, the Eleventh granted the 60(b)(6) Motion and reinstated the death penalty. In doing so, the Eleventh Circuit stated that the mere change in decisional law by the Supreme Court was not sufficient to support the 60(b)(6) motion. The Eleventh Circuit in *Ritter* required and found extraordinary circumstances:

> Our investigation thus leads us to conclude that something more than a "mere" change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. Several factors in this case, in addition to the fact of the change in the law, persuade us that the circumstances are sufficiently extraordinary to warrant relief under Rule 60(b)(6).

Id. at 1401.

The Eleventh Circuit in *Ritter v. Smith* found that several other factors, along with a change in decisional law, presented the extraordinary circumstances which warranted the Rule 60(b)(6) relief. Those additional factors creating the extraordinary circumstances in *Ritter* included:

1) the previous erroneous judgment declaring the death penalty statute unconstitutional and the re-sentencing of Ritter had not been executed, so that the greater concomitant interest in the finality of an executed judgment was not involved. *Id.*, at 1401. That

is, the underlying case (the Alabama death penalty imposition in *Ritter*) was still procedurally alive, due to the pending re-sentencing, when the change in decisional law (by the Supreme Court in *Baldwin*) had occurred;

2) the invalidation of the state's capital sentencing procedure and the requirement of a new sentencing hearing, which had not yet occurred. The Eleventh Circuit acknowledged that Ritter was never fully relieved of the possibility of the death penalty because re-sentencing had not yet occurred; *Id.* at 1404-1405.

3) the Supreme Court's supervening decision, *Baldwin v. Alabama*[8], was rendered expressly to resolve a conflict between it and the earlier circuit decision in *Ritter.* That is, the Eleventh Circuit noted the close relationship between the *Ritter* case, and the *Baldwin* case. That relationship existed because the Supreme Court expressly stated in *Baldwin* that it had accepted writs in order to resolve the controversy established by the Eleventh Circuit's decision in *Ritter*[9];

4) the situation presented was analogous to that in which two cases are related, not because

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[8] 472 U.S. 372 (1985).

[9] *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

the Supreme Court's decision was rendered to resolve a conflict between them, but because they arose out of the same factual transaction; and

5) there were considerations of comity which argued for relieving the state from the federal declaration of unconstitutionality and writ of habeas corpus that upset the finality of a state court's judgment. *Ritter,* 811 F.2d at 1401-03.

The Fifth Circuit correctly distinguished the "rare" circumstances of *Ritter* from *Garibaldi II* and found that almost none of the above factors in *Ritter* were present in *Garibaldi II*:

1) *Garibaldi I*'s judgment was final. To put it more bluntly, the case of *Ritter* was still very much alive, and *Garibaldi I* was dead;

2) *Garibaldi I's* final judgment does not have prospective effects, unlike *Ritter* who had not yet been sentenced and who still required a sentencing hearing;

3) *Garibaldi I* did not cause a split in the circuits, but rather the Third Circuit case of *Dunleavy*[10] and the Seventh Circuit case of *Chandler v. Cook County*[11] caused the

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[10] *Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002) (held that a "county" *was not* a person under the False Claims Act.)

[11] *Cook County v. United States, ex rel. Chandler*, 277 F.3d 696 (7th 2002) (held that a "county" *was* a person under the False Claims Act.)

split on the status of "counties," while *Garibaldi I* specifically concerned "school boards";

4) *Garibaldi I* does not arise from the same factual transaction as the Supreme Court case of *Chandler v. Cook County.*[12] *Chandler v. Cook County* concerned the status of "counties," while *Garibaldi I* concerned "school boards;" *See* App. 8a-9a of the Petition; and

5) *Garibaldi II* does not involve considerations of comity for state laws and federal decisions, and Petitioners agree. *See* pp. 11-12 of the Petition.

According to the Fifth Circuit, *Garibaldi I* was not an "integral part" of the Supreme Court's decision-making process in *Chandler v. Cook County*. In fact, in *Chandler v. Cook County,* the Supreme Court only cited *Garibaldi I* in a single footnote, with no discussion, and the Supreme Court's opinion did not otherwise mention *Garibaldi I.* Furthermore, the Supreme Court did not overrule *Garibaldi I.*

The Fifth Circuit held that:

> An extraordinary situation justifying relief from judgment is not created every time the Supreme Court lists a case as one that merely contributed to a split between circuits. This factor should not

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[12] *Cook County v. United States, ex rel. Chandler*, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003).

> be dispositive of a Rule 60(b)(6) motion and was not, in fact, dispositive in *Ritter*. It is not extraordinary for the Supreme Court to deny certiorari in a court of appeals case that it ultimately overrules in the review of a later similar case.

See App. 9a of the Petition.

Consequently, *Garibaldi I* did not cause a "two to one split" giving rise to *Chandler.* It was the Third Circuit's decision in *Dunleavy v. County of Delaware* which was in direct conflict with the Seventh Circuit's decision in *Chandler v. Cook County,* and therefore, *Dunleavy* played the integral role in the Supreme Court's decision making process.

In disagreeing with the district court's assessment that extraordinary circumstances were present in *Garibaldi II*, the Fifth Circuit stated that:

> After almost every resolution of a circuit conflict there is a losing litigant somewhere who could argue similarly for reopening his case because it was decided erroneously in light of the subsequent Supreme Court decision. The differences between such cases in terms of the closeness of the relationship between the decision in the losing litigant's case and the subsequent Supreme Court decision, diligence in filing for relief from judgment, proximate causation of the circuit conflict and the like would appear to be marginal in the large majority of split resolution situations. For these reasons, we do not think the present case

> has any features that cause it to be exceptional to such a marked extent from other cases involving resolution of circuit conflicts as to create 'extraordinary circumstances' justifying reopening of the judgment.

See App. 6a of the Petition.

Just like *Garibaldi II,* the case of *Ritter* held that something more than a change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. The Firth Circuit's holding is consistent with *Ritter*. *Garibaldi II* and *Ritter* clearly applied the same law, *i.e.,* a change in the law alone is not an extraordinary circumstance which justifies relief from a final judgment. However, due to the unique and specific facts of the capital punishment case of *Ritter,* the Eleventh Circuit found extraordinary circumstances were present which warranted Rule 60(b)(6) relief.

B. The Fifth Circuit's decision in *Garibaldi II* is consistent with the Tenth Circuit's Decision in *Pierce v. Cook & Co.*

Pierce v. Cook & Co., 518 F.2d 720, 723 (10th Cir.1975) is not at all applicable to *Garibaldi II.* The case of *Pierce* held that where two cases arising out of the same motor vehicle accident resulted in conflicting judgments between a federal court and a state court, Rule 60(b)(6) relief was warranted. *Garibaldi II* certainly did not involve divergent results in federal and state courts arising from the same transaction or occurrence.

Pierce v. Cook & Co. applied the following rule of law:

> (1) in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice, and (2) (a) change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief.

Pierce v. Cook & Co., Inc., 518 F.2d 720, 723 (10th Cir. 1975), citing *Collins v. City of Wichita, Kansas*, 254 F.2d 837, 839 (10th Cir. 1955).

The Tenth Circuit in *Pierce* held that the specific facts of the case presented extraordinary circumstances which justified Rule 60(b)(6) relief. In *Pierce,* the same vehicular accident produced divergent results in federal and state courts. Factually, a Cook & Company truck collide with a car driven by Mr. Pierce. Mr. Pierce was killed and the passengers in his car were injured. Mr. Pierce's surviving widow brought suit which was heard in federal court after being removed from state court based upon diversity jurisdiction. The suit by the guest-passengers was heard in state court.

The federal district court granted Cook & Company summary judgment on the ground that under the Oklahoma decision in *Marion Machine, Foundry & Supply Co. v. Duncan*, 187 Okl. 160, 101 P.2d 813, the shipper, Cook, as a matter of law, could not be liable for the torts of its independent contractor, the driver of the truck. The Tenth Circuit affirmed that decision.

In the state court action, the Oklahoma state court also granted summary judgment for Cook on the basis of the *Marion Machine* decision. However, the case then went to the Oklahoma Supreme Court which specifically overruled *Marion Machine* and held the shipper, Cook, could be liable for the torts of its independent contractor, the driver of the truck.

The Tenth Circuit decision became final in January, 1971. The Oklahoma Supreme Court decision became final in May, 1974. In November, 1974, Mrs. Pierce filed a Rule 60(b) motion for relief from her judgment.

In granting the Rule 60(b)(6) relief, the Tenth Circuit stated:

> In diversity jurisdiction cases, the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction or occurrence. Here they were not. The unusual combination of events which have occurred make the situation extraordinary. The federal courts in which plaintiffs were forced to litigate have given them substantially different treatment than that received in state court by another injured in the same accident. The outcome determination principle mandated by *Erie v. Tompkins* [13] has been violated. Relief under Rule 60(b)(6) "is appropriate to accomplish justice" in an extraordinary situation.

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[13] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74-75, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Just like *Garibaldi II, Pierce* held that something more than a change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. However, due to the unique and specific facts of *Pierce*, *Garibaldi II* and *Pierce* reached different results.

Different cases which apply the same law to their own set of unique facts may reach different results. In such an instance, this does not constitute a conflict for purposes of granting certiorari. In particular, *Garibaldi II, Ritter* and *Pierce* all clearly applied the same law, but due to the unique facts of each case, *Garibaldi II* reached a different result than *Ritter* and *Pierce*. Accordingly, there is no conflict, and this Honorable Court should deny the Petition for Writ of Certiorari.

II. The lower courts do not exhibit confusion as to the authority of the District Courts to grant Rule 60(b)(6) relief based on a change in the decisional law.

The Petitioners further attempt to support their Writ by alleging that there is confusion among the lower courts with respect to the district court's authority to grant Rule 60(b)(6) relief. However, the cases cited by Petitioners are completely inapplicable to the facts and circumstances of *Garibaldi II*. When the Petitioners allege there is confusion among the lower courts, the Petitioners are not comparing similar cases. The Petitioners are mixing apples with oranges in order to create confusion where it does not exist.

The following cases were cited by Petitioners to purportedly demonstrate confusion exhibited by the lower courts. The alleged confusion, if any, only exists because the

cases cited by Petitioner are dissimilar and each concern uniquely different issues and facts.

Cincinnati Ins. Co. v. Flanders Elec. Motor Service, Inc. 131 F.3d 625 (7th Cir. 1997) concerned different results between a federal court decision and a subsequent state court decision. A federal court judgment held that under Indiana law the term "sudden and accidental," as it is used in insurance, would exclude pollution coverage. Thus, coverage was excluded by the federal court and that judgment was final. However, over a year and a half later, the Indiana Supreme Court held that the words "sudden and accidental" in the pollution exclusion clause would not exclude pollution coverage. Rule 60(b)(6) relief was denied. The Court held that there were no extraordinary circumstances, but only a subsequent change in decisional state law – unlike, *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 723 (10th Cir. 1975) where the federal court and state court produced different results arising from the same exact accident.

DeWeerth v. Baldinger, 38 F.3d 1266, 1272-73 (2d Cir. 1994) also concerned different results between a federal court decision and a subsequent state court decision. A federal court judgment held that under New York law, the statute of limitations applicable to an action to recover stolen property required a showing of reasonable diligence in locating stolen property. Three years later, a decision by the New York Court of Appeals held that the statute of limitations applicable to this action did not require a showing of reasonable diligence in locating stolen property. Rule 60(b)(6) relief was denied. Again, the Court held that there were no extraordinary circumstances, but only a subsequent change in decisional state law.

Marrero Pichardo v. Ashcroft, 374 F.3d 46 (2d Cir. 2004) concerned the deportation of an alien and his incompetent attorney who failed to raise the change in the law which was pending while the original case was still proceeding. Pichardo was going to be deported based upon a prior driving under the influence (DUI) conviction. However, at the time his petition for writ of habeas corpus was pending, a dramatic change to governing law occurred. A change in case law after his deportation order became final, but while his petition for writ of habeas corpus was pending, made deportations based upon DUI convictions invalid. The Second Circuit granted Rule 60(b)(6) relief based upon the district court's failure to reconsider Pichardo's order of deportation once it was made aware of such an important fact, which in large part was due to incompetent lawyering. Thus, extraordinary circumstances were present.

Tonya K. v. Board of Educ., 847 F.2d 1243, 1247-48 (7th Cir. 1988), is not really a Rule 60(b)(6) case, but rather it concerns the application of a retroactive statute which would allow Plaintiff to reopen her case. The case involved the attorney fees' retroactivity provision of the Handicapped Children's Protection Act. The Seventh Circuit affirmed the district court's grant of Rule 60(b) relief reopening the case for a determination of fees, because it interpreted the statutory provision to be a mere "invitation" by Congress to the courts to reconsider the issue. *Id.* at 1247. The amended statute made attorneys' fees available to litigants prevailing under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1411-20, if the cases were pending on July 4, 1984. The Seventh Circuit held that the Plaintiffs' claim for attorney fees was pending on July 4, 1984.

Norgaard v. DePuy Orthopaedics, Inc. 121 F.3d 1074, 1077 (7th Cir. 1997) concerned a Plaintiff's decision not to appeal her case when the Supreme Court was considering the same issue in another case. An artificial hip recipient failed to appeal the court's adverse decision which held that Medical Device Amendments preempted her state common law claim against manufacturer and designer of her hip, which was sold as "investigational device." Two months after that adverse decision, the Supreme Court's decision in *Medtronic*[14] held that the Act's preemption does not apply to certain class of cases. In denying the Rule 60(b)(6) relief, the Seventh Circuit held that Norgaard could have, but did not, present the same arguments advanced by plaintiffs in *Medtronic*, and her decision not to appeal ended the case.

Polites v. United States, 364 U.S. 426, 427, 81 S. Ct. 202, 203-204 (1960) also concerned a party who failed to appeal his adverse judgment. His involved the revocation of his citizenship and a judgment of denaturalization. An appeal from that judgment was docketed. However, the Plaintiff voluntarily dismissed his appeal with prejudice. Four years later the petitioner moved to vacate the judgment of denaturalization based upon a subsequent change in decisional law. The Supreme Court raised the possibility of reopening a final judgment based upon a clear and authoritative intervening change in the law, but the alleged intervening decisions relied up by Polites were not effective to alter the law controlling the Plaintiff's case.

Plaut v. Spendthrift Farm, Inc. 514 U.S. 211, 115 S. Ct. 1447 (1995) involved the violation of constitutional

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[14] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

separation of powers principles when Congress amended the law and instructed the federal courts to reopen final judgments. The Securities Exchange Act § 27A(b) provided that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991. The Supreme Court held that the statute violated constitutional separation of powers principles by instructing the federal courts to reopen final judgments. Thus, the judicial decision becomes the last word with regard to particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what court said it was.

Accordingly, there is no confusion among the lower courts, and the above cases cited by Petitioners are clearly distinguishable from *Garibaldi II*. Accordingly, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

This Honorable Court should deny the Petition for a Writ of Certiorari in *Garibaldi II* because the Fifth Circuit's decision does not conflict with the decisions of other Courts of Appeal.

"Litigation must end some time, and the fact that a court may have made a mistake in the law, when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside." *Ritter*, 811 F.2d at 1401, *citing Collins v. City of Wichita,* 254 F.2d 837, 839 (10th Cir. 1958) *Id.* at 839; *see also McKnight v. United States Steel Corp.*, 726 F.2d 333

(7th Cir. 1984); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982); *Lubben v. Selective Service System Local Board,* 453 F.2d 645 (1st Cir. 1972); *Title v. United States,* 263 F.2d 28 (9th Cir.), *cert. denied,* 359 U.S. 989, 79 S. Ct. 1118, 3 L. Ed. 2d 978 (1959); *Berryhill v. United States,* 199 F.2d 217 (6th Cir. 1952); *Loucke v. United States,* 21 F.R.D. 305 (S.D.N.Y. 1957).

A contrary rule would allow endless litigation limited only by the longevity of the previous parties, or their heirs and assigns. Indeed, the Petitioners desire an open-ended interpretation of Rule 60(b)(6) so that parties may be encouraged to seek redress thirty years after a judgment has been made final, based only on a change of heart and the mere presumption that they have finally outlasted the prior generation of jurists. *Id.*

As such, the School Board prays that this Honorable Court deny the Petition for a Writ of Certiorari.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
WILLIAM GARIBALDI AND CARLOS SAMUEL

Petitioners

v.

ORLEANS PARISH SCHOOL BOARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(6) authorizes a district court to grant relief from a final judgment in "extraordinary circumstances," the determination of which is left to that court's sound discretion. The question presented is whether a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law—regardless of the facts and circumstances that accompany such change.

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REPLY BRIEF FOR THE PETITIONERS

Petitioners William Garibaldi and Carlos Samuel ("the Relators") respectfully file this reply brief in support of the petition for writ of certiorari.

The brief in opposition of Respondent Orleans Parish School Board ("the Board") helpfully furnishes a précis of seemingly every case cited by the petition. Moreover, the brief helpfully reminds us—some thirty times in its twenty pages—that "extraordinary circumstances" is the governing standard for granting relief under Federal Rule of Civil Procedure 60(b)(6). What the brief does *not* do is controvert the petition's showing (1) that the decision of the Fifth Circuit is in conflict with the decisions of other courts of appeals; and (2) that the lower courts exhibit confusion concerning the authority of the district courts to grant relief under that rule in connection with a change in the decisional law.

Accordingly, the Relator's petition for writ of certiorari should be granted.

ARGUMENT

We address two points raised by the opposition brief.

I. In Practice, the Fifth Circuit Adheres to a Categorical Rule that a Change in Controlling Decisional Law Can *Never* Constitute "Extraordinary Circumstances."

The petition posits a circuit split on the question presented. The premise of the posited split is that the Fifth Circuit adheres to a categorical rule that a change in controlling decisional law can *never* constitute "extraordinary circumstances." Although the Board accuses the Relators of having "manufactured an alleged conflict" by "misstating the actual holding of the Fifth Circuit decision," Br. Opp. 5, it cannot reasonably be disputed that the decision below is only the latest in a long line of Fifth Circuit decisions that apply this categorical rule.

Some fifteen years ago, the Fifth Circuit laid down the following blanket rule regarding the extraordinary circumstances that all concede are required for relief under Rule 60(b)(6): "A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment." *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir.), *cert. denied*, 498 U.S. 829 (1990). This Court has consistently held—and reiterated *just last week*—that "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, No. 04-6432, slip op. at 10 (June 23, 2005) (citing *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978)). Notwithstanding this prescribed deference, the Fifth Circuit over the course of many years has repeatedly relied on *Bailey*'s blanket rule to *overturn* the district court's exercise of discretion to grant Rule 60(b)(6) relief based on extraordinary circumstances in connection with a change in the decisional law.[1]

That brings us to the decision below, in which the Fifth Circuit *again* overturned the district court's discretionary determination of extraordinary circumstances and its consequent grant of relief under Rule 60(b)(6). In adhering to its long-standing and consistent practice in this regard, the court of appeals further confirmed its categorical position. Not content simply to "distinguish" the Eleventh Circuit's decision in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987), the court below refused explicitly to "assume or agree" that *Ritter* was correctly decided.

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[1] As cited in the petition (at 9), these decisions span some dozen years, from *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990) (relying on *Bailey*'s categorical rule to reverse the grant of Rule 60(b)(6) relief), through *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995) (same), *cert. denied*, 517 U.S. 1221 (1996), to *Hess v. Cockrell*, 281 F.3d 212, 216 & n.18 (5th Cir. 2002) (same). In the cited discussion, the petition incorrectly implied that *Bailey* itself reversed the grant of Rule 60(b)(6) relief. Actually, *Bailey* affirmed the denial of such relief.

App. 7a. More significantly, the Fifth Circuit repudiated as "dicta unnecessary to the . . . holding" its prior statement—*expressly based on Ritter*—that "relief from judgment may be appropriate where the subsequent decision is closely related to the judgment from which relief is sought, 'such as where the Supreme Court resolves a conflict between another circuit ruling and that case.'" App. 7a (quoting *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 n.6 (5th Cir. 1995) (citing *Ritter*, 811 F.2d at 1402-03), *cert. denied*, 517 U.S. 1221 (1996)).[2]

Other courts of appeals, more faithful to the rule that "Rule 60(b) proceedings are subject to only limited and deferential appellate review," *Gonzalez v. Crosby*, slip op. at 10, have on occasion *affirmed* the district court's *grant* of Rule 60(b)(6) relief in connection with a change in the controlling law. Along with *Ritter v. Smith*, examples include *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989), and *Tonya K. v. Board of Education*, 847 F.2d 1243, 1249 (7th Cir. 1988). Indeed, while necessarily much rarer, still other courts have even *reversed* a district court's *denial* of such relief. *See, e.g., Pichardo v. Ashcroft*, 374 F.3d 46, 55-56 (2d Cir. 2004). But we are unaware of *any* Fifth Circuit decision that does either. (So, apparently, is the Board, though it had every incentive to find and cite such a decision.)

In these circumstances—not to mention the strained distinctions drawn by the lower court between this case and *Ritter v. Smith*, *see* Pet. 11-13—it is simply not credible to assert that the "unique facts of each case," Br. Opp. 15, are sufficient to explain the different results in this case vis-à-vis *Ritter* and *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir.

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[2] It is appropriate to note that in *Gonzalez v. Crosby*, this Court approvingly cited *Ritter v. Smith* as an example of a case in which the state properly (indeed, successfully) sought "to use Rule 60(b) . . . to reopen a habeas judgment granting the writ." Slip op. at 10 (emphasis deleted).

1975) (en banc), *cert. denied*, 423 U.S. 1079 (1976). To the contrary, the prevailing rule in the Fifth Circuit—in actual practice if not in we-expressly-acknowledge-a-circuit-split precision—is that a change in controlling decisional law can *never* constitute the extraordinary circumstances necessary for relief under Rule 60(b)(6). In adhering to this rule, the decision below stands in obvious conflict with the decisions of other courts of appeals.

The incongruity of the decision below is only magnified by comparing it to the decisions of this Court, both old and new. As described in the petition (at 15), *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam), is a stark example of the Court's recognition that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the Court's regular] rules." *Id.* at 26-27 (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)). After the instant petition was filed, moreover, the Court recognized in *Gonzalez v. Crosby* that a "change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment." Slip op. at 12 n.9; *see also id.* at 12 (*affirming* the district court's denial of Rule 60(b)(6) relief because the case sought to be reopened was "long since final," a circumstance compounded by the moving party's "lack of diligence in pursuing review of the [disputed] issue"). The decision below cannot be reconciled with the principles recognized by this Court.[3]

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[3] There is some suggestion in the opposition brief (at 3-4) that the existence of "extraordinary circumstances" is a *prerequisite* to the exercise of the district court's discretion to grant relief under Rule 60(b)(6), rather than the *occasion* for exercising such discretion. Even if this distinction exists, we fail to see its import. No court (and no party to this case) fails to acknowledge that extraordinary circumstances are the sine qua non of Rule 60(b)(6) relief. Moreover, this case simply does not present the question whether the district court has any discretion to *deny* relief after having found such circumstances.

II. The Opposition Brief Does Not Cast Doubt on the Confusion in the Lower Courts as to Their Ability to Grant Rule 60(b)(6) Relief Based on a Change in the Decisional Law.

Not even attempting to dispute the petition's showing (at 17) that the "recurrence of decisional-law related issues under Rule 60(b)(6) is surprisingly robust," the opposition brief tries to explain away the confusion in the lower courts on the ground that all of the cases "are dissimilar and each concern[s] uniquely different issues and facts." This explanation is entirely beside the point.

As to the application of the principle that the district courts have considerable discretion in granting or denying relief pursuant to Rule 60(b)(6), *see* Pet. 18, the opposition does not deny that the Second Circuit has not hesitated to *overturn* the district court's decisions in cases involving a change in the decisional law. *See, e.g., Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004) (reversing denial of relief); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-75 (2d Cir. 1994) (reversing grant of relief). The point is not whether these decisions are correct—indeed, they reached opposite results —or whether they are factually "dissimilar" to each other or to the decision below. Rather, the point is that they (like the Fifth Circuit decisions cited above) are hard to square with the principle that "the trial court is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)," *Standard Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (per curiam), or the principle that "Rule 60(b) proceedings are subject to only limited and deferential appellate review," *Gonzalez v. Crosby*, slip op. at 10.

As to the effect of *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), on the authority of district courts to grant Rule 60(b)(6) relief in connection with a change in the decisional law, *see* Pet. 19, the opposition brief simply does not confront the issue. The belief (erroneous, we believe) that *Plaut* "closed the door" on such relief is seemingly what explains the divergence between Judge Easterbrook's opinions

in *Tonya K. v. Board of Education*, 847 F.2d 1243, 1249 (7th Cir. 1988), and *Norgaard v. DePuy Orthopaedics*, 121 F.3d 1074, 1076 (7th Cir. 1997).[4] Again, the issue is not the correctness vel non of these decisions but whether they stand as examples of confusion in the lower courts as to the availability of Rule 60(b)(6) relief in cases of this sort.

Accordingly, review is further warranted because the question presented is both recurring and a source of confusion in the lower federal courts.

CONCLUSION

In pleading for the Court to deny the petition because "[l]itigation must end some time," Br. Opp. at 19, the Board makes a bare "appeal to the virtues of finality," *Gonzalez v. Crosby*, slip op. at 4. As the Court has explained, however, that "policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Id.* Moreover, it has long been the case that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the] rules." *Gondeck*, 382 U.S. at 26-27. To be sure, the contrary practice prevailing in the Fifth Circuit—that a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) based on a change in the controlling decisional law, regardless of the facts and circumstances accompanying such change—has the virtue of simplicity and ready application. But the continuing prevalence of such a practice in one court of appeals, in conflict with other courts, should not go unreviewed by this Court.

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[4] Curiously, the opposition asserts (at 17) that *Tonya K.* was "not really a Rule 60(b)(6) case." That assertion is, shall we say, difficult to reconcile with the opinion's own account of the case: "The plaintiffs promptly filed a motion under Fed. R. Civ. P. 60(b)(6), asking the district court to reinstate their request for attorneys' fees . . . . The district court granted that request. . . . Both [defendants] have appealed, although neither challenges the amount of the award." 847 F.2d at 1245.

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Dated: June, 2005.

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